No. 95-639

DEC 29 1995

In The

Supreme Court of the United States

October Term, 1995

SHOP 'N SAVE WAREHOUSE FOODS, INC.,

Petitioner,

vs.

UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO-CLC, LOCAL UNION NO. 88,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DONALD KENNETH ANDERSON, JR.
Counsel of Record
Attorney for Respondent
8011 Clayton Road
St. Louis, Missouri 63117
(314) 727-7100

QUESTIONS PRESENTED

1. Whether the Eighth Circuit Court of Appeals erred in reversing the decision of the United States District Court, Eastern District of Missouri, on the grounds that the District Court improperly substituted its own findings of fact for those contained in the June 7, 1993 award of Arbitrator Thomas J. Erbs pertaining to the grievance of U.F.C.W. Local No. 88 member and Shop 'n Save employee Sam Coffey?

2. Whether it is appropriate for this Honorable Court to grant review of a decision of the Eighth Circuit Court of Appeals which is: (a) not contrary to prior decisions of this Court; (b) not contrary to prior decisions of the Eighth Circuit or the other Circuits; and (c) simply holds that the District Court exceeded the legitimate scope of authority afforded federal courts hearing challenges to the validity of labor arbitration awards which this Honorable Court identified in *United Paper Workers' International Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987)?

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TO THE HONORABLE SUPREME COURT:

The Respondent, United Food and Commercial Workers, AFL-CIO, CLC, Local Union No. 88 ("the Union"), respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Shop 'n Save Warehouse Foods, Inc. ("the Company").

STATEMENT OF THE CASE

Sam Coffey, a Company employee and member of the Union, injured his back while at work on April 16, 1992. (Pet. App. 21a). Because of the severity of his injury, he was not able to return to work until May 12, 1992. (*Id.*)

On August 7, 1992, the Company furnished "Airtemp Advantage" back support belts to each of their Union employees pursuant to a recently established Company policy requiring all employees to wear back belts while on duty. (Pet. App. 22a). The warning label affixed to Mr. Coffey's back belt includes the following sentence: "If you are under the care of a health care practitioner, consult with him/her before using the belt." (Pet. App. 25a).

Although Mr. Coffey wore his back belt for approximately two weeks, he discontinued the practice because he believed the belt was aggravating his back injury. (Pet. App. 22a). He then informed the store manager of his situation. (*Id.*) On August 18, 1992, Mr. Coffey had his back examined by Dr. Solomon Noguera, the physician who had previously treated him in the immediate aftermath of his 1992 back injury. Dr. Noguera initially recommended that Mr. Coffey refrain from wearing the belt for one week. (Pet. App. 23a). After a second examination on August 25, 1992, Dr. Noguera cleared Mr. Coffey to return to work, and advised him

to wear his back belt "real loose". (*Id.*) Mr. Coffey, however, refused to wear the belt and in support of his decision cited comments made by Dr. Noguera that the belt could be harmful because it prevented a full range of movement. (*Id.*)

The Union then asked the Company to obtain another medical opinion to determine whether Mr. Coffey could wear the back belt without injury. (Pet. App. 23a). The Company agreed and scheduled an appointment for Mr. Coffey with Dr. Herbert Rosenbaum, a clinical neurologist, on September 3, 1992. (*Id.*) Mr. Coffey submitted to this examination. After an approximately forty-five (45) minute examination consisting principally of conversation, and which included no reliance upon the evaluation of x-rays or other objective tests, Dr. Rosenbaum concluded that Mr. Coffey could use the back belt which he had been supplied by the Company. (*Id.*)

Meanwhile, however, on September 2, 1992, Mr. Coffey sought a "third" opinion from Dr. Raymond Cohen, also a neurologist. (Pet. App. 23a). Upon the conclusion of his evaluation of Mr. Coffey, Dr. Cohen wrote a letter stating that in his "medical and neurological opinion" Mr. Coffey's use of the back support belt supplied by the Company "aggravates his condition". (Pet. App. 24a).

After his appointment with Dr. Rosenbaum on September 3, 1992 had concluded, Mr. Coffey immediately reported to his store for the purpose of returning to work. (Pet. App. 25a - 26a). At that time, he informed his store manager that, out of concern for his physical welfare, he was unwilling to abide by the Company work rule requiring the use of a back belt. (Pet. App. 26a). Upon learning of Mr. Coffey's principled opposition to complying with the back belt work rule, the Company denied him the opportunity to return to work. (*Id.*) Despite the total absence of any oral or written resignation

announcement from Mr. Coffey, the Company unilaterally considered him to have resigned. (*Id.*) Contending that he had been terminated without cause in violation of the collective bargaining agreement then in effect between the parties, Mr. Coffey promptly notified the Union, which on September 4, 1992, in a manner consistent with the contractual procedures established for such situations, timely filed a grievance on his behalf with the Company. (*Id.*) As the parties were unable to resolve this grievance, the matter was submitted to arbitration before Arbitrator Thomas J. Erbs. (Pet. App. 20a).

At the outset of the March 17, 1993 arbitration hearing, the Company formally submitted to the arbitrator that the substantive issue before him was whether Mr. Coffey had "voluntarily quit" his employment on September 3, 1992, or, alternatively, was discharged for proper cause pursuant to the management rights clause of the parties' collective bargaining agreement. (Pet. App. 30a, 41a). During the remainder of the arbitration hearing, however, the Company occasionally solicited testimony for the purposes of demonstrating that Mr. Coffey was terminated in accordance with the express terms of an oral agreement negotiated by the authorized agents of the Union and the Company prior to the date of Mr. Coffey's appointment with Dr. Rosenbaum. With respect to this alleged oral agreement, Company Claims Administrator Jenny Sullins offered the following recollection of a conversation she had held with then Union President Edward M. O'Reilly:

> I got a call from Ed O'Reilly, and he said that — *you know, we sort of talked about* the fact that Sam was returned, and he asked if we could get a second opinion, and I told him that I would talk to John Dougherty about that.

(Arb. Tr. 144, emphasis added). Subsequently, witness Sullins

offered the following imprecise recollection of a later conversation she held with then Union President O'Reilly:

> Ed O'Reilly said to me he said, *you know — he was more or less glad* we were complying with his request to get another opinion, and that we would *go with* whatever the opinion was.

(Arb. Tr. 145, emphasis added). Neither of these short arbitration hearing transcript excerpts, both of which directly concern the nature and content of the oral agreement allegedly entered into by agents for the Company and the Union, is included in the recitation of facts which comprise the "Statement of the Case" portion of the Company's Petition. (Pet. 6-7).

During direct examination by counsel for the Company during the arbitration hearing, Company Vice-President of Human Resources John Dougherty testified as follows regarding the nature and content of the oral agreement allegedly entered into by agents of the Company and the Union:

> Q. (By Mr. Stewart) Okay. Please tell the Arbitrator what Mr. O'Reilly said to you and you to him.
>
> A. He called me concerning this letter from Dr. Noguera and asked me if the Company would consider to resolve this issue with another opinion. And I said "If it will resolve it, certainly". And we proceeded. I told them I'd tell Jenny Sullins to set up another independent doctor and get another opinion.

Q. And what did he say?

A. He said "Fine. That *should* resolve it."

(Arb. Tr. 93-94, emphasis added). The foregoing excerpt from the arbitration hearing transcript is cited in the Company's Petition, where it is regarded as a fact "establishing the existence of a settlement agreement between the parties" despite witness Dougherty's recollection that Union President O'Reilly concluded the discussion by using the subjunctive "should" instead of a more definitive term. (Pet. 7).

During cross-examination by counsel for Shop 'n Save, Mr. Coffey equivocally acknowledged the existence of an agreement between the Company and the Union to send him to a new doctor, but provided no indication of the purpose of such an agreement. The actual testimony of Mr. Coffey reads as follows:

> Q. [by Mr. Stewart] Okay. Did O'Reilly or Mrs. Adams ever tell you that they had extracted an agreement from the Company to send you to a second doctor?
>
> A. Yes. *I think Peggy had said something* about that.
>
> Q. And thereafter, you went and saw Dr. Rosenbaum; is that right?
>
> A. Correct.

(Arb. Tr. 227, emphasis added). This excerpt from the arbitration hearing transcript is cited in the Company's Petition, where it is regarded as a fact "establishing the

existence of a settlement agreement between the parties" sufficient to justify the Company's termination of Mr. Coffey. (Pet. 7).

Other than the foregoing excerpts from the testimony of Ms. Sullins, Mr. Dougherty, and Mr. Coffey, the testimony of Company and Union witnesses presented during the March 17, 1993 arbitration hearing before Arbitrator Thomas J. Erbs does not address either the specific *content* of, or any potential *consequences* arising from, the oral settlement agreement which the Company alleges to have entered into with the Union. None of the witnesses at the arbitration hearing, including Ms. Sullins, Mr. Dougherty, and Mr. Coffey, alleged that the Company provided the Union with notification, prior to the grievant's appointment with Dr. Rosenbaum on September 3, 1992, that any refusal on his part to abide completely with the diagnosis of Dr. Rosenbaum would constitute grounds for termination.

After carefully weighing the evidence before him, Arbitrator Erbs formally issued his opinion and award on June 7, 1993, which ordered the Company not only to reinstate Mr. Coffey to his former position without any loss of benefits, but also to reimburse him for any wages lost as a result of his wrongful termination. (Pet. App. 42a - 43a). Specifically, the arbitrator determined that: (1) the purpose of the back belt rule was personal safety, and because Mr. Coffey had a reasonable belief that wearing the belt was unsafe, his failure to comply with the back belt rule was excused; (2) the original back belt rule did not specify punishment for failure to abide by the rule; and (3) the grievance had not been settled by means of an oral agreement between the parties, and the Company had not asked the arbitrator to enforce any such settlement agreement. (Pet. App. 41a - 42a).

With respect to the factual question of whether the parties ever entered into an oral agreement sufficient to justify the termination of Mr. Coffey for refusing to wear a back belt, the arbitrator found that "Company evidence" did not conclusively establish, but instead merely "*indicated* that the Union agreed to accept the results of the examination by the third physician." (Pet. App. 23a, emphasis added). Elsewhere in his award, the arbitrator again questioned the existence of any oral settlement agreement such as that alleged by the Company. He stated:

> In essence, the Company argues that the case was settled on September 3rd. Yet if a settlement did take place, then it follows there would be some action to enforce the settlement rather than a submission asking the Arbitrator to decide whether the Grievant either voluntarily quit or was discharged for cause. In the absence of such a submission, the Arbitrator believes it more appropriate to base his holding on the limited power he derives from the bargaining agreement rather than to assume he can both adjudicate and enforce an undertaking to which he was not a party and which is outside the grievance procedure.

(Pet. App. 41a). At no point in his award does Arbitrator Erbs "expressly state that he will not consider undisputed and uncontradicted evidence going to the essence of the parties' Collective Bargaining Agreement." (Pet. i). In the "Question Presented For Review" section of its Petition, however, the Company alleges that Arbitrator Erbs' award does contain such a statement. (*Id.*)

On June 18, 1993, the Company filed a Complaint requesting the District Court to set aside the arbitrator's decision on the grounds that an oral settlement agreement allegedly entered into by the parties justified the Company's termination of Mr. Coffey for refusing to wear a back belt while on duty. On October 14, 1994, the District Court granted the Company's motion for summary judgment, and denied the Union's cross-motion for summary judgment. (Pet. App. 10a-17a). The District Court held that the arbitrator exceeded his authority by disregarding a binding oral settlement agreement entered into by the parties. (Pet. App. 16a-17a).

On November 14, 1994, the Union appealed the District Court's decision to the Eighth Circuit Court of Appeals. On July 31, 1995, the Court of Appeals reversed the decision of the District Court on the grounds that the District Court improperly substituted its own findings of fact for those contained in the arbitration award being reviewed. (Pet. App. 1a-7a).

SUMMARY OF ARGUMENT

Pursuant to this Honorable Court's unanimous decision in *United Paper Workers' International Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987), a labor arbitrator's good-faith findings of fact are not properly subject to judicial review. With respect to the case at bar, Arbitrator Thomas J. Erbs clearly and unequivocally determined in his June 7, 1993 award resolving the grievance of Sam Coffey that the parties *did not* enter into a binding oral agreement whereby the ability of Mr. Coffey to wear a back belt while on duty would necessarily be resolved in accordance with the medical opinion of Dr. Herbert Rosenbaum, and whereby Mr. Coffey would be subject to termination upon refusing to abide by Dr. Rosenbaum's diagnosis. Consequently, the District Court erred in vacating

Arbitrator Erbs' award on the stated grounds that in his award he had acknowledged the existence of an oral "last chance" settlement agreement between the parties, but subsequently ignored and refused to enforce it. The Eighth Circuit Court of Appeals, however, properly reversed the United States District Court decision on the grounds that the District Court improperly substituted its own findings of fact for those contained in Arbitrator Erbs' award.

Moreover, the Company's Petition provides this Honorable Court with no reasonable justification to grant review of a decision of the Eighth Circuit Court of Appeals which: (a) is not contrary to prior decisions of this Court; (b) is not contrary to prior decisions of the Eighth Circuit or the other Circuits; and (c) simply holds that the District Court exceeded the legitimate scope of authority afforded federal courts hearing challenges to the validity of labor arbitration awards which this Honorable Court identified in *United Paper Workers' International Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987). The Petitioner has neither demonstrated the existence of any significant issue of substantive or procedural law, nor established the presence of any "important question of federal law", which calls for review or supervision by this Court on writ of certiorari. United States Supreme Court Rule 10.1(c), 28 U.S.C.A.

REASONS FOR DENYING THE WRIT

I.

THE EIGHTH CIRCUIT COURT OF APPEALS DID NOT ERR IN REVERSING THE DECISION OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, ON THE GROUNDS THAT THE DISTRICT COURT IMPROPERLY SUBSTITUTED ITS OWN FINDINGS OF FACT FOR THOSE CONTAINED IN ARBITRATOR ERBS' AWARD.

The Eighth Circuit Court of Appeals did not err in reversing the decision of the United States District Court, Eastern District of Missouri, on the grounds that the District Court improperly substituted its own findings of fact for those contained in Arbitrator Erbs' award. Pursuant to this Honorable Court's unanimous decision in *United Paper Workers' International Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987), a labor arbitrator's good-faith findings of fact are not properly subject to judicial review:

> [B]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing the decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find fact and a court may not reject those findings simply because it disagrees with them.

United Paper Workers' International Union v. Misco, Inc., 484 U.S. 29, 37 (1987). According to the *Misco* decision, the good-faith judgment of an arbitrator in resolving factual questions must be upheld by federal courts hearing challenges to the validity of arbitration awards in the interests of furthering Congress' "decided preference for [the] private settlement of labor disputes" without judicial or other governmental intervention. *Id.* at 37.

In accordance with the foregoing clearly defined standard of review, the good-faith factual finding of Arbitrator Thomas J. Erbs, in his June 7, 1993 award resolving the grievance of Mr. Coffey — to-wit, that the parties' *did not* enter into an oral settlement agreement whereby the issue of whether or not Mr. Coffey should be required to wear a back belt while on the job would necessarily be resolved in accordance with the medical opinion of Dr. Herbert Rosenbaum, and whereby Mr. Coffey would be subject to termination upon refusing to abide by Dr. Rosenbaum's diagnosis—should be immune from judicial review. A careful examination of the language the Arbitrator chose to employ in his award reveals that he did not conclude that the parties entered into such an agreement, but merely stated that the evidence introduced by the Company at the arbitration hearing suggested the existence of an oral agreement. According to Arbitrator Erbs: "Company evidence *indicated* that the Union agreed to accept the results of the examination by the third physician." (Pet. App. 23a, emphasis added). Arbitrator Erbs' choice of the verb "indicated" in this context is of paramount significance since, according to the principal definition contained in *Webster's Third New International Dictionary*, the word *indicate* inherently connotes imprecision and the absence of complete or absolute certainty:

indicate: to point out or point to or toward

> with more or less exactness: show or make known with a fair degree of certainty . . .
>
> c: to state or express in a brief or cursory way: state or express without going into great detail: SUGGEST, INTIMATE, HINT.

Webster's Third New International Dictionary (1971) at 1150. Indeed, Missouri courts also recognize that: "To 'indicate' does not imply certainty but probability." *Anthonis v. Quinn*, 533 S.W. 2d 691, 695 (Mo. App. 1976). Consequently, it is not surprising to discover that throughout his award, Arbitrator Erbs repeatedly uses the terms "indicate" and "indication", in accordance with both standard dictionary definitions and accepted legal usage, to connote a lack of clarity and certainty in the evidence before him. (*E.g.*, Pet. App. 24a, lines 17, 19, 20; 26a, line 12).

Still further evidence that Arbitrator Erbs never acknowledged the existence of an oral settlement agreement between the parties sufficient to justify Mr. Coffey's termination can be found upon examination of yet another part of his June 7, 1993 award. Near the conclusion of his award, Arbitrator Erbs expressly doubts whether the authorized representatives of the Union and the Company ever entered into a binding oral agreement which would be dispositive of the grievance:

> The Company also argues that the grievance was resolved based on Dr. Rosenbaum's decision that the Grievant was able to wear the back belt. In essence, the Company argues that the case was settled on September 3rd. Yet *if a*

> *settlement did take place, then it follows there would be some action to enforce the settlement* rather than a submission asking the Arbitrator to decide whether the Grievant either voluntarily quit or was discharged for cause. In the absence of such a submission, the Arbitrator believes it more appropriate to base his holding on the limited power he derives from the bargaining agreement rather than to assume he can both adjudicate and enforce an undertaking to which he was not a party and which is outside the grievance procedure.

(Pet. App. 41a, emphasis added). Given the vague and equivocal nature of the evidence introduced by the Company at the arbitration hearing regarding the specific content and potential consequences of the purported agreement between the parties, and the fact that the Company's conduct in defending Mr. Coffey's grievance was inconsistent with the alleged existence of such a settlement agreement, Arbitrator Erbs reached the conclusion that no settlement agreement such as that hypothesized by the Company existed.

Clearly, therefore, since whether or not a binding oral settlement agreement existed is a question of fact, and since this Honorable Court has held that federal courts hearing challenges to the validity of arbitration awards "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts", Arbitrator Erbs' good-faith factual assessment that the parties *did not* enter into a binding oral settlement agreement which justified the Company's discharge of Mr. Coffey should be beyond legal challenge. *United Paper Workers' International Union v. Misco, Inc.*, 484 U.S. 36, 37-38 (1987). Furthermore,

this should be so regardless of whether or not the Company or the district court reviewing Arbitrator Erbs' award happen to agree with his reasoning on this particular factual question. *Id.* Nevertheless, in its review of Arbitrator Erbs' June 7, 1993 award, the United States District Court erroneously and improperly rejected the plain meaning of the sentence — "Company evidence indicated that the Union agreed to accept the results of the examination by the third physician."—in favor of its own interpretation of the evidence. After citing the sentence in question on page three (3) of its Memorandum opinion (Pet. App. 12a), the United States District Court made the following comment in the course of explaining its ruling:

> The arbitrator disregarded the oral agreement of the parties even though Coffey acknowledged its existence in his testimony during the hearing. Furthermore, *the arbitrator acknowledged its existence by finding in his award that United Food agreed to accept the results of the examination of Dr. Rosenbaum.*

(Pet. App. 13a, emphasis added). When properly interpreted in terms of both standard dictionary definitions and accepted legal usage, however, Arbitrator Erbs' sentence — "Company evidence indicated that the Union agreed to accept the results of the examination by the third physician." — in no way constitutes an acknowledgment that the authorized representatives of the Union and the Company actually entered into a binding agreement that would be dispositive of the grievance filed on behalf of Mr. Coffey. Consequently, the District Court plainly exceeded the scope of its authority, and grievously erred to the detriment of both Mr. Coffey and the Union, when it improperly rejected Arbitrator Thomas J. Erbs' findings of fact, and substituted therefor its own "review of the

record" relating to the possible existence of a binding oral settlement agreement between Shop 'n Save and the Union regarding the ability of Mr. Coffey safely to wear a back belt while at work. (Pet. App. 17a). Accordingly, the Eighth Circuit Court of Appeals, by means of a *unanimous* decision authored by Senior Circuit Judge Heaney, properly reversed the United States District Court's incorrect ruling on the grounds that the District Court improperly substituted its own findings of fact for those contained in the June 7, 1993 award of Arbitrator Thomas J. Erbs.

II.

THE COMPANY'S PETITION PROVIDES THIS HONORABLE COURT WITH NO REASONABLE JUSTIFICATION TO GRANT REVIEW OF A DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS WHICH: (A) IS NOT CONTRARY TO PRIOR DECISIONS OF THIS COURT; (B) IS NOT CONTRARY TO PRIOR DECISIONS OF THE EIGHTH CIRCUIT OR THE OTHER CIRCUITS; AND (C) SIMPLY HOLDS THAT THE DISTRICT COURT EXCEEDED THE LIMITED SCOPE OF AUTHORITY AFFORDED FEDERAL COURTS HEARING CHALLENGES TO THE VALIDITY OF LABOR ARBITRATION AWARDS WHICH THIS HONORABLE COURT IDENTIFIED IN *UNITED PAPER WORKERS' INTERNATIONAL UNION V. MISCO, INC.*, 484 U.S. 29, 37 (1987).

The Company's Petition provides this Honorable Court with no reasonable justification to grant review of a decision of the Eighth Circuit Court of Appeals which: (a) is not contrary to prior decisions of this Court; (b) is not contrary to prior decisions of the Eighth Circuit or the other Circuits; and (c) simply holds that the District Court exceeded the

legitimate scope of authority afforded federal courts hearing challenges to the validity of labor arbitration awards which this Honorable Court identified in *United Paper Workers' International Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987). Moreover, the Petitioner has neither demonstrated the existence of any significant issue of substantive or procedural law, nor established the presence of any "important question of federal law", which calls for review or supervision by this Court on writ of certiorari.

Without question the rulings of the Eighth Circuit Court of Appeals in this case do not conflict with any prior decisions of the Eighth Circuit or any prior decisions of Courts of Appeals in the other circuits. Indeed, the Petitioner cites only one other Eighth Circuit decision, *Coca-Cola Bottling Company of St. Louis v. Teamsters, Local 688*, 959 F.2d 1438 (8th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 635 (U.S. 1993), and in its decision in the case at bar, the Eighth Circuit Court of Appeals has clearly distinguished the fact pattern of the present case from that of *Coca-Cola*. (Pet. App. 3a - 7a). Furthermore, this distinction carries special weight since The Honorable Judge Pasco Bowman, who authored the *Coca-Cola* decision, was a member of the Eighth Circuit panel which decided the instant matter. (Pet. App. 1a).

Just as the rulings of the Eighth Circuit Court of Appeals in this case do not conflict with any prior decisions of the Eighth Circuit, so too they do not conflict with any prior decisions of Courts of Appeals in the other circuits. Indeed, the Company's Petition never directly alleges such a conflict, and only cites two cases from other circuits: *Bakers Union Factory v. ITT Continental Baking Company, Inc.*, 749 F.2d 350 (6th Cir. 1984); and *United Mine Workers v. Barnes & Tucker Company, Inc.*, 561 F.2d 1093 (3d Cir. 1977). (Pet. App. 14 n. 1, 16 n. 2). Both of these cases hold that settlement

agreements between parties which are sufficiently specific as to be capable of implementation are judicially enforceable. Yet precisely the same standard is expressly acknowledged by the Eighth Circuit in its decision in the case at bar during the court's discussion of the continuing precedent value of *Coca-Cola*. (Pet. App. 3a - 7a). By way of contrast, however, neither the decision of the Sixth Circuit in *Bakers Union Factory*, nor the decision of the Third Circuit in *United Mine Workers*, holds that federal district courts may legitimately substitute their own findings of fact for those contained in the arbitration awards they are called upon to review. Consequently, no conflict exists between either of these Court of Appeals cases and the decision of the Eighth Circuit Court of Appeals with respect to the instant matter.

Additionally, no conflict exists between the decision of the Eighth Circuit Court of Appeals in the case at bar and any prior rulings of this Honorable Court. Specifically, the ruling of the Eighth Circuit that a district court may not substitute its own findings of fact for those contained in an arbitration award is entirely consistent with this Court's decision in *United Paper Workers' International Union v. Misco, Inc.*, 484 U.S. 29 (1987). In that decision, this Honorable Court expressly stated:

> [B]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept.

Id. at 37. Petitioner, however, stubbornly refuses to accept Arbitrator Erbs' good-faith factual finding that the parties *did not* enter into a binding oral agreement whereby the ability of

Mr. Coffey to wear a back belt while on the job would necessarily be resolved in accordance with the medical opinion of Dr. Herbert Rosenbaum, and whereby Mr. Coffey would be subject to termination upon refusing to abide by Dr. Rosenbaum's diagnosis. Respondent submits that Petitioner's discontent with Arbitrator Erbs' factual finding not only is of no legal consequence, but furthermore is misplaced since, assuming *arguendo* the actual existence of an oral "last chance" settlement agreement, the Company's own counsel contributed to this perceived as unsatisfactory result through both the statement of issues they elected to submit to the arbitrator, and their failure to secure more definitive testimony from various Company and Union witnesses regarding the specific content of, and potential consequences inherent in, the parties' agreement to schedule an appointment for Mr. Coffey with Dr. Rosenbaum. (Pet. App. 41a). By instead choosing to find fault with Arbitrator Erbs, Petitioner now finds itself in the incongruous and highly ironic position of championing a national labor policy which favors the private, non-judicial resolution of disputes, while simultaneously appealing to a federal court, for the second time, in the hopes of having a private arbitration award overturned. (Pet. 15-17).

Finally, the Company's Petition neither demonstrates the existence of any significant issue of substantive or procedural law, nor establishes the presence of any "important question of federal law", which calls for review or supervision by this Honorable Court on writ of certiorari. According to the Petitioner, if the decision of the Eighth Circuit Court of Appeals in the instant matter is allowed to stand, it will have

> an adverse and possibly chilling effect on the federal labor policy established in *Misco* because companies will be unwilling

> to engage in the private settlement of labor disputes if such settlements can be rendered meaningless by an arbitrator who simply chooses to ignore the existence of the agreements.

(Pet. 17). Respondent submits that such an argument is not only based on the categorically false premise that Arbitrator Erbs discerned the existence of a settlement agreement sufficient to justify the Company's termination of Mr. Coffey, but is also inherently illogical. Instead of decreasing the likelihood of settlements, this Honorable Court's denial of the Company's Petition will, if anything, produce an opposite and salutary effect, to-wit: serving to increase the likelihood that such settlement agreements, when not directly memorialized in writing, are carefully constructed in a manner which, when necessary, permits their existence and terms to be readily established and reviewed. Certainly the proliferation of casually entered into oral settlement agreements which exist solely in the fallible human memories of Union and Company agents and officers, yet nonetheless supplement and supersede written collective bargaining agreements, is neither desirable nor something which this Honorable Court should encourage by granting the Company's Petition in the instant matter.

CONCLUSION

United Food and Commercial Workers, AFL-CIO, CLC, Local Union No. 88 prays that this Honorable Court deny the Petition for Writ of Certiorari of Shop 'n Save Warehouse Foods, Inc., because the holdings of the Eighth Circuit Court of Appeals were not in error, and because the case presents no important federal law issue appropriate for the Court's review.

Respectfully submitted,

DONALD KENNETH ANDERSON, JR.
Counsel of Record
Attorney for Respondent
8011 Clayton Road
St. Louis, Missouri 63117
(314) 727-7100